

MEMORANDUM OF LAW

DATE: March 4, 1992

TO: Norm Stamper, Executive Assistant Chief, San Diego Police
Department

FROM: City Attorney

SUBJECT: Needle Exchange

You recently asked about the effect of the San Diego Police Department, as a law enforcement agency, permitting citizen's groups to distribute hypodermic needles and syringes for the purported purpose of combatting the spread of AIDS. Absent a change to present state law, permitting such distribution poses serious problems concerning the successful prosecution of others for the same offense and may constitute a violation of the separation of powers.

The citizens' proposed conduct is unlawful under the current Business and Professions Code, the Health and Safety Code and the Penal Code. Business and Professions Code section 4149 makes it a crime to unlawfully possess a hypodermic needle or syringe. Business and Professions Code section 4140 makes it a crime to furnish a hypodermic needle or syringe by sale or otherwise without a permit. Only a pharmacist or physician may otherwise furnish syringes in order to administer insulin or adrenaline. Bus. & Prof. Code Section 4146. A violation of these statutes constitutes a misdemeanor. Bus. & Prof. Code Section 4382.

Health and Safety Code section 11364 makes it a crime to possess paraphernalia for unlawfully injecting a controlled substance. Furnishing or possessing drug paraphernalia with the intent to deliver is a misdemeanor. Health & Safety Code Section 11364.7. Finally, a conspiracy to commit any of these crimes is also unlawful. Penal Code Section 182(a)(1).

The department has a duty to enforce the laws of the State of California. Section 57 of the San Diego City Charter requires the Chief of Police to "exercise all powers and duties provided by general laws or by ordinance of the Council." Section 22.0601 of the San Diego Municipal Code charges the department with "the enforcement of all penal ordinances and laws." Finally, section 9.1 of the department's Personal Conduct Policy requires all officers to "detect and arrest violators of the law."

Notwithstanding these provisions, the Penal Code does not mandate that an arrest necessarily be made whenever an officer observes a violation of the law. Penal Code section 834 states that "an arrest may be made by a peace officer or a private person." Likewise, Penal

Code section 836 provides that "any peace officer may make an arrest" with a warrant or when he or she has reasonable cause to believe that a misdemeanor has occurred in his or her presence. The discretion imparted by these statutes, however, has unfortunately led in some circumstances to the undesirable concept of "selective enforcement."

Selective enforcement is unconstitutional when an individual has been "singled out for prosecution on the basis of some invidious criterion." *Murgia v. Municipal Court*, 15 Cal. 3d 286, 288 (1975). Although unequal treatment resulting from laxity of enforcement or non-arbitrary selective enforcement of a statute is not considered a denial of due process, *Id.* at 296, intentional and purposeful discrimination on the basis of "race, religion, or other arbitrary classification," is unconstitutional. *Id.* at 297, 302, (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1961)).

The requirement of "intentional and purposeful discriminatory enforcement" has been applied in testing the constitutionality of police department policies enforcing penal statutes. *People v. Milano*, 89 Cal. App. 3d 153, 164-65 (1979). Unfettered discretion given to police in deciding who to arrest without "objective criteria" provided by the legislature may also violate the requirements of due process. See *People v. Superior Court (Caswell)*, 46 Cal. 3d 381, 393 (1988); *People v. Soto*, 171 Cal. App. 3d 1158, 1166-67 (1985). Until the relevant state laws are changed or qualified, it could be argued compellingly that to permit only certain groups to distribute needles and syringes would constitute violations of equal protection and due process.

A department decision not to arrest the citizens may also violate the separation of powers. Cal. Const. art. III Section 3. The department is delegated powers from the executive branch and may not legislate. The department may not, therefore, unilaterally decide to exclude an entire group of persons from the mandates of the law. This proposition is clearly demonstrated by the legislature's recent proposal of Assembly Bill 2525 (Brown). In AB 2525, the legislature has proposed a law which would permit counties to institute a pilot project for the distribution of hypodermic needles and syringes and exempt certain individuals from prosecution. A copy of AB 2525 is attached.

These authorities lead to the conclusion that the exemption of certain groups from arrest for the distribution of hypodermic needles and syringes poses serious questions about the prosecution of others for the same offense. Exempting the citizens from arrest would create an "arbitrary classification" of individuals who were free from prosecution. This "classification" could possibly affect the arrest of drug users for possessing needles and syringes, although this result is not as likely because drug users are not being "singled out" for prosecution. The classification would be very likely, however, to affect the prosecution of any person or group "setting up shop" to distribute paraphernalia to

drug users. The result is that anyone could start distributing needles and syringes. A person arrested for distribution while others were not being arrested would be entitled to discover all evidence of the department's policy. *Murgia*, 15 Cal. 3d at 301. A showing of invidious discrimination would be grounds for dismissal of the criminal action. *Id.* at 293-294, n.4. Moreover, the person could potentially have a cause of action for civil damages under 42 U.S.C. Section 1983.

The end result is that the department would not have control over who could distribute needles. The Clean Needle and Syringe Exchange Pilot Project, on the other hand, establishes a permit requirement governed by the local health officer's operating procedures. Thus, distributors would be controlled. The pilot project also requires an effort to secure treatment for drug addiction, for staff expertise in working with injection drug users and for the collection of data relating to the distribution of needles and syringes to injection drug users. The department could not accomplish any of these goals without violating the separation of powers. Without these safeguards, however, it is anyone's guess who will begin distributing needles in San Diego.

Given these problems, there are many potentially adverse consequences if citizens' groups are allowed to distribute needles and syringes. Should AB 2525 be enacted and a pilot project instituted in San Diego County, we will advise you accordingly.

JOHN W. WITT, City Attorney

By

Gary Brozio

Deputy City Attorney

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Attachment

ML-92-20